UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 68

Docket No. DE-0839-10-0139-I-1

Sherryl D. Warren,

Appellant,

v.

Department of Transportation,

Agency.

July 7, 2011

Mark S. Bove, Esquire, Denver, Colorado, for the appellant.

Humberto Ruiz, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review and the appellant has filed a cross-petition for review of the initial decision that reversed the agency's decision to deny the appellant relief under the Federal Erroneous Retirement Coverage Corrections Act (FERCCA), 5 U.S.C. § 8331 note, and remanded the case to the agency for further processing. For the reasons set forth below, we GRANT the agency's petition, DENY the appellant's cross-petition, and REVERSE the initial decision. The agency's decision is SUSTAINED.

BACKGROUND

¶2 The appellant worked as an Air Traffic Controller for the Federal Aviation Administration (FAA) from May 22, 1975, through August 27, 1981, after which she left government service for a period of approximately 25 years. Initial Appeal File (IAF), Tab 13 (Stipulation of Facts). On April 15, 2007, the FAA rehired the appellant as an Air Traffic Assistant under an excepted service appointment not to exceed April 14, 2012. *Id.*; IAF, Tab 8, Subtab 2o. The agency placed the appellant in the Civil Service Retirement System (CSRS) Offset, a version of CSRS for employees whose service is subject to deductions for both CSRS and the Old Age, Survivors and Disability Insurance program under the Social Security Act, 42 U.S.C. § 401, *et seq*. IAF, Tab 13; *see* 5 U.S.C. § 8349; FERCCA, § 2002(b)(5); *Taxera v. Office of Personnel Management*, 95 M.S.P.R. 97, ¶ 2 (2003); 5 C.F.R. §§ 831.1001, 839.102. The appellant was provided a period of 6 months to decide whether to remain in CSRS Offset or elect coverage under the Federal Employees' Retirement System (FERS). IAF, Tab 13. She did not elect FERS coverage during that period. *Id.*

¶3 In October 2008, the appellant notified the agency of her belief that the agency incorrectly placed her in CSRS Offset and should have instead placed her in FERS. IAF, Tab 8, Subtab 2i. By letter dated October 31, 2008, the agency informed the appellant that it had determined that she was correctly placed in CSRS Offset. *Id.*, Subtab 2h. The following year, the appellant renewed her objection to her placement in CSRS Offset. *Id.*, Subtab 2g. By letter dated November 13, 2009, the agency informed the appellant that it had considered her communications as a request for corrective action under FERCCA and was issuing its final decision denying her request. *Id.*, Subtab 2a.

¶4 The appellant filed an appeal with the Board on December 17, 2009. IAF, Tab 1. She argued that the Standard Form (SF) 50 marking her appointment as an Air Traffic Assistant designated the appointment as indefinite, and that under 5 C.F.R. § 831.201(a)(13), temporary appointments which have been designated

as indefinite are excluded from CSRS coverage, and consequently from CSRS Offset coverage as well. IAF, Tabs 14, 16. The administrative judge agreed with the agency that the appointment was not indefinite, but went on to find that the appellant was nonetheless excluded from CSRS coverage because she was serving a term appointment, which is excluded from CSRS coverage under 5 C.F.R. § 831.201(a)(14). IAF, Tab 18 (Initial Decision, May 27, 2010). Accordingly, the administrative judge reversed the agency's decision and remanded the case to the agency to determine what the appellant's retirement options may be and to fulfill its other responsibilities under FERCCA. *Id.*

¶5 On petition for review, the agency contends that the administrative judge erred in finding that the appellant was serving a term appointment. Petition for Review File (PFR File), Tab 3. In her cross-petition for review, the appellant again contends that her appointment was indefinite and therefore excluded from CSRS coverage under 5 C.F.R. § 831.201(a)(13). PFR File, Tab 4. The agency has responded to the appellant's cross-petition. PFR File, Tab 6.

ANALYSIS

¶6 An employee who has been placed under the wrong retirement system for a period of 3 or more years since December 31, 1986, is entitled to corrective action under FERCCA. *See* FERCCA, § 2003(b); 5 C.F.R. §§ 839.101(b), 839.201; *Stuart v. Department of the Air Force*, 104 M.S.P.R. 297, ¶ 13 (2006).[1] With certain exceptions, an employee who was erroneously placed in CSRS or CSRS Offset, but should have been covered by FERS, may elect to be placed in CSRS Offset or FERS retroactively to the date of the error. FERRCA, § 2101(b); *Wallace v. Office of Personnel Management*, 88 M.S.P.R. 375, ¶ 9 (2001);

[1] At the time the appellant filed her appeal, the alleged retirement coverage error had not yet been in effect for 3 years. The 3 year period has since passed, however, and it is the Board's practice to adjudicate an appeal that was premature when it was filed but becomes ripe while pending with the Board. *See Simnitt v. Department of Veterans Affairs*, 113 M.S.P.R. 313, ¶ 9 (2010).

5 C.F.R. §§ 839.241, 839.401. An employee who was erroneously placed in CSRS or CSRS Offset, but should have been covered by Social Security only, will in most cases have the opportunity to elect between CSRS Offset and Social Security only. FERCCA, § 2121(b); 5 C.F.R. §§ 839.241, 839.401.

¶7 The Office of Personnel Management (OPM) has set forth its interpretation of the laws and regulations pertinent to CSRS, CSRS Offset, and FERS coverage in Chapter 10 of the *CSRS and FERS Handbook for Personnel and Payroll Offices* (*Handbook*) (1998), *available at* http://www.opm.gov/retire/pubs/handbook/C010.pdf.[2] The *Handbook* explains that an employee who, like the appellant, was formerly employed under CSRS, is rehired after a break in service of more than 365 days, and who has at least 5 years creditable civilian service as of December 31, 1986, will generally be placed in CSRS Offset with an option to elect FERS. *Id*., §§ 10A2.1-3, 10B3.1-1 (Example 1); *see also id*., § 10A1.1-2(I) (defining "five year test" for exclusion from automatic FERS coverage). However, where the current appointment is excluded from CSRS coverage by law or regulation, an employee who otherwise meets the criteria for placement in CSRS Offset will instead be covered by Social Security only with an option to elect FERS. *See id*., §§ 10A2.1-3, 10B3.1-1 (Example 6). Hence, the question of whether the appellant is entitled to relief under FERCCA turns on whether her current appointment is excluded from CSRS coverage by law or regulation.

The appellant did not receive an indefinite appointment.

¶8 OPM has issued regulations excluding certain categories of employees from coverage under CSRS. *See* 5 C.F.R. § 831.201(a); *Handbook*, § 10A1.3-

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[2] Although the *Handbook* lacks the force of law, it is entitled to deference in proportion to its "power to persuade." *Eldredge v. Department of the Interior*, 451 F.3d 1337, 1341-42 (Fed. Cir. 2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see, e.g.*, *Luten v. Office of Personnel Management*, 110 M.S.P.R. 667, ¶ 9 n.3 (2009) (granting "some deference" to the *Handbook*); *Moore v. Department of Veterans Affairs*, 109 M.S.P.R. 386, ¶ 9 (2008) (same). In this case, we find it appropriate to defer to the applicable sections of the *Handbook*.

3(C). Among those excluded are employees serving under "non-permanent appointments, designated as indefinite," made after January 23, 1955, the effective date of the repeal of Executive Order 10180. 5 C.F.R. § 831.201(a)(13); *The Handbook*, § 10A1.3-3(C)(4). The appellant asserts that the SF-50 recording her appointment to the Air Traffic Assistant position shows that her appointment was designated as "indefinite," and therefore is excluded from CSRS coverage.

¶9 That is incorrect. Block 24 of the SF-50, which specifies employee tenure status, is marked with the number 3, designating tenure group 3. IAF, Tab 8, Subtab 2o; *see Guide to Personnel Data Standards*, Tenure, *available at* www.opm.gov/feddata/gp59/cpdf/legalauthority1.pdf. The SF-50 also employs the word "indefinite" as a short-hand description for that tenure group. *See* IAF, Tab 8, Subtab 2o. However, tenure group 3 is not limited to excepted service employees serving indefinite appointments, but also includes, among others, excepted service employees who are serving appointments with a specific time limitation of more than 1 year. 5 C.F.R. § 351.502(b)(3); *Guide to Personnel Data Standards*, Tenure. Thus, notwithstanding the presence of the word "indefinite" on the SF-50, the appellant's tenure group designation is consistent with an appointment that is not indefinite but is instead time-limited. Moreover, the Board has held that tenure group status for purposes of determining an employee's rights in a possible reduction in force is not dispositive evidence of an employee's retirement rights. *De Jesus v. Office of Personnel Management*, 63 M.S.P.R. 586, 593 (1994), *aff'd*, 62 F.3d 1431 (Fed. Cir. 1995) (Table); *Fredeluces v. Office of Personnel Management*, 57 M.S.P.R. 598, 602 n.4, *aff'd*, 16 F.3d 421 (Fed. Cir. 1993) (Table).

¶10 The appellant further argues that the appointment, though time-limited, is nonetheless of indefinite duration in that it could end at any time up to and including April 12, 2012. *See* PFR File, Tab 4 at 6. However, OPM has construed the term "indefinite appointment" to mean "[o]ne given a nonpermanent employee hired for an *unlimited* period of time." *Rosete v. Office*

of Personnel Management, 48 F.3d 514, 519 (Fed. Cir. 1995) (quoting Federal Personnel Manual, Supp. 296-33, Subch. 35, at 35-36 (Oct. 8, 1993)) (emphasis added); *see Slater v. Department of Homeland Security*, 108 M.S.P.R. 419, ¶ 10 n.1 (2008) (although it is no longer in effect, the Board may still look to the Federal Personnel Manual for guidance). *See also* 5 C.F.R. § 351.502(b)(3)(i) (defining tenure group 3 to include, among others, excepted service employees whose tenure is "indefinite (i.e., without a specific time limit)"). We therefore conclude that the appellant's appointment, which was limited in duration to a maximum of 5 years, is not an indefinite appointment excluded from CSRS coverage under 5 C.F.R. § 831.201(a)(13).

The appellant is not serving a "term appointment."

¶11 OPM regulations also provide that a "term appointment" is excluded from coverage under CSRS. 5 C.F.R. § 831.201(a)(14); *Handbook*, § 10A1.3-3(C). In interpreting that exclusion, the administrative judge relied on the regulations at 5 C.F.R. part 316, which distinguish between "temporary" appointments, limited to an initial period of 1 year with a possible 1-year extension, and "term" appointments, which have a duration of more than 1 year but generally not more than 4 years. *See* 5 C.F.R. §§ 316.301, 316.401. The administrative judge concluded that, because the appellant's appointment has a time limit of greater than 1 year, it is by nature a term appointment, rather than a temporary appointment, and is therefore excluded from CSRS coverage under 5 C.F.R. § 831.201(a)(14). On petition for review, the agency contends that the appointment is by definition not a term appointment because it exceeds the 4-year limit. *See* 5 C.F.R. § 316.301(a).

¶12 We agree with the agency that the appellant is not serving a term appointment excluded from CSRS coverage. However, we base our finding not on the length of the appointment, but rather on the fact that the appointment was in the excepted service. As OPM explained when it issued the regulations at

5 C.F.R. part 316, the term appointment provisions under that part apply exclusively to the competitive service:

> Excepted appointments are not covered by 5 C.F.R. part 316. However, unless the specific excepted service authority provides otherwise, agencies may make an excepted appointment on a time limited basis for more than 1 year. Such excepted appointments are comparable to term appointments in the competitive service, but there is no maximum time limit unless specified by a particular excepted service authority.

63 Fed. Reg. 63,781, 63783 (Nov. 17, 1998). Consequently, the appellant's 5-year excepted service appointment, while "comparable" to a term appointment in the competitive service, is not properly speaking a term appointment.[3] Moreover, OPM has interpreted 5 C.F.R. § 831.201(a)(14) as excluding from CSRS coverage only those employees serving term appointments under 5 C.F.R. Part 316. *See Handbook*, § 10A1.3-3(C).[4] Because the appellant is not serving a term appointment, or any other category of appointment excluded from CSRS coverage by law or regulation, we conclude that she was properly placed in CSRS Offset and is not entitled to relief under FERCCA.

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[3] We note that the Board has on occasion erroneously referred to "term" appointments in the excepted service. *See*, *e.g.*, *Gamble v. Department of the Army*, 111 M.S.P.R. 529, ¶ 22 (2009); *Killingsworth v. Department of Health & Human Services*, 11 M.S.P.R. 273, 275 (1982). To the extent those decisions are inconsistent with our finding in this case, we hereby modify them.

[4] Appointments of this type are designated by nature of action codes 108 and 508, which OPM has reserved for nonstatus term appointments in the competitive service. *Id.*; *see Guide to Processing Personnel Actions*, Chapter 10, Table 10-E, *available at* http://www.opm.gov/feddata/gppa/Gppa11.pdf; *Guide to Personnel Data Standards*, Nature of Action (1), *available at* http://www.opm.gov/feddata/gp59/cpdf/natureaction1.pdf. The appellant's SF-50 is marked with nature of action code 171, designating a time-limited excepted service appointment. IAF, Tab 8, Subtab 2o; *See Guide to Processing Personnel Actions*, Chapter 11, Table 11-A, *available at* http://www.opm.gov/feddata/gppa/Gppa11.pdf; *Guide to Personnel Data Standards*, Nature of Action (1).

ORDER

¶13 The agency's decision is SUSTAINED. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.